NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 33 of 2023

[Arising out of the Impugned Order dated 02.11.2022 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Bench-I in CP (IB) No. 349 of 2020]

In the matter of:

M/s. Kashyap lnfraprojects Pvt. Ltd.
Through its Authorised Signatory
(Having CIN U45204GJ2008PTC054465)
Registered Office:
502, Liberty Chambers,
Tamaliyawad, Nanpura, Surat,
Gujarat 395001

…Appellant

Versus

M/s. Hi-Tech Sweet Water Technologies Pvt. Ltd.
Through its Managing Director
(Having CIN U45205GJ2000PTC037188)
Registered Office:
4, Gopal Nagar Nandida Char Rasta,
GIDC, Bardoli Surat,
Gujarat 394601

…Respondent

Present:

For Appellant : Mr. Arunava Mukherjee and Mr. Nisarg P. Khatri, Advocates.

For Respondent : Mr. Udian Sharma, Mr. Manav Mitra, Mr. Jaitegan Singh, Ms. Aarzoo Aneja, Mr. Akshaya Jeba Kumar, Advocates.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated

02.11.2022 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Ahmedabad, Bench-I) in CP (IB) No. 349 of 2020. By the impugned order, the Adjudicating Authority has rejected the Section 9 application of the Operational Creditor by holding it as not maintainable due to pre-existing disputes. Aggrieved by the impugned order, the present Appellant has been preferred by the Operational Creditor-Appellant.

2. Coming to the brief facts of the case, the Corporate Debtor- M/s Hi-Tech Sweet Water Technologies Pvt. Ltd. had entered into a contract with the Government of Bihar to install pump-sets at various locations within the State. Towards executing the contract, the Corporate Debtor placed purchase orders of pump-sets on the Operational Creditor-M/s Kashyap Infraprojects Private Limited. The Operational Creditor had supplied the pump-sets and raised invoices on the Corporate Debtor. The invoices/bills raised on the Corporate Debtor having remained unpaid, the Operational Creditor allegedly reminded the Corporate Debtor on several occasions for payment. Since no payments were received, the Operational Creditor sent statutory demand notice under Section 8 of the IBC on 01.09.2020 to the Corporate Debtor. Since further payments were still not received by the Operational Creditor, Section 9 application was filed before the Adjudicating Authority on 30.09.2020 which was dismissed by the Adjudicating Authority on 02.11.2022. Assailing the impugned order, the present appeal has been filed by the Operational Creditor.

3. Making his submissions, Shri Arunava Mukherjee, the Ld. Counsel for the Appellant stated that the Operational Creditor had been supplying the goods and services to the Corporate Debtor on a regular basis and that pump-sets and related accessories were supplied after due verification by way of a third-party inspection. The solar pump-sets were received by the Corporate Debtor without raising any dispute or objection at the time of delivery of the said material. Even the bills raised against the consignment of goods were received by the Corporate Debtor without any dispute. At the time of filing of the Section 9 application, the aggregate outstanding liability of the Corporate Debtor was Rs.1.86 crore with Rs. 1.42 cr as principal amount and Rs. 43.87 lakhs towards interest @ 18% per annum. It was submitted that though the reason for non-payment as attributed by the Corporate Debtor was the presence of pre-existing disputes, however, the actual reason was that the Corporate Debtor was not in good financial health and had already been blacklisted by the Government of Bihar and therefore lacked the capacity to pay. The Ld. Counsel for the Appellant also submitted that the dispute mentioned by the Corporate Debtor was not a genuine dispute but was a created dispute. Submission was also made that there is no genuine foundation of pre-existing dispute since all the pump sets were supplied after third party inspection which agency had certified the goods at the time of dispatch. It was also asserted that though the Adjudicating Authority had correctly rejected the WhatsApp messages relied upon by the Corporate Debtor to press evidence towards the existence of pre-existing disputes, but it committed a mistake in supporting the averment of the Respondent-Corporate

Debtor of a pre-existing dispute subsisting between the two parties basis an email of 07.01.2020 and minutes of a meeting held on 26.01.2021.

4. Refuting the submissions made by the Appellant, Shri Udian Sharma, the Ld. Counsel for the Respondent submitted that the Corporate Debtor had sent their reply to the Section 8 demand notice on 18.09.2020 and this Notice of Dispute clearly articulated the aspect of delayed supply of goods and supply of defective goods by the Appellant and the consequential adverse impact on the goodwill and reputation of the Corporate Debtor. Besides raising the ground of pre-existing dispute, it was asserted the Corporate Debtor had denied that payments were due and that no amount was payable till the task of complete and effective installation of the pump-sets was completed. It was further stated that the Government of Bihar had given the Corporate Debtor a contract for design, construction, supply, testing and commissioning of 211 mini piped water supply schemes and provisioning of solar power pumps in various districts of Bihar and for this purpose, they had entered into a business relationship with the Operational Creditor for supply and installation of pump-sets. However, the Operational Creditor supplied the said pump-sets after protracted delay besides supplying defective pump-sets of sub-standard quality. It was contended that these defects were communicated from time to time via WhatsApp messages and emails to the Appellant and that these WhatsApp messages appear at pages 49-110 in their Reply- affidavit before this Tribunal which fact had also been brought to the attention of Adjudicating Authority. Besides the WhatsApp messages, it was also categorically informed

to the Operational Creditor vide email dated 07.01.2020 that the solar pump-systems supplied by them were not working and were asked to take necessary corrective action. However, the Operational Creditor failed to redress the defects which in turn led to a backlash from the Government of Bihar leading to termination of the contract and blacklisting of the Corporate Debtor. Furthermore because of the supply of dysfunctional or non-functional pump sets, the Government of Bihar had put a stop on the release of payment and had subjected the release of further payment to replacement of the defective pump-sets. It was emphatically asserted by the Corporate Debtor that these WhatsApp messages and email of 07.01.2020 by the Corporate Debtor highlighting the ongoing dispute preceded the Section 8 demand notice clearly evidenced pre-existing disputes. Hence the operational debt was neither due nor payable as it was embroiled in a dispute.

5. Attention was also adverted to the fact that a meeting was held on 26.01.2021 between the representatives of the two parties wherein the Operational Creditor had agreed to replace the defective pump sets. It was also pointed out that basis the agreement arrived at the meeting held on 26.01.2021, the Operational Creditor while agreeing to replace the defective pump sets also agreed to withdraw the Section 9 application filed against the Corporate Debtor. The Operational Creditor however reneged on the said agreement compelling the Corporate Debtor to file a Section 95 application against the Operational Creditor for fraudulent initiation of CIRP.

6. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

7. The short point for our consideration is whether there is any infirmity in the impugned order passed by the Adjudicating Authority dismissing the Section 9 application on the ground that the operational debt claimed by the Appellant was embedded with pre-existing disputes.

8. Before we delve into analysing the tenability of the findings of the Adjudicating Authority, it may be useful and constructive to refer to the statutory construct of IBC as contained in Sections 8 and 9 of the IBC, we notice that Section 8 requires the Operational Creditor, on occurrence of a default by the Corporate Debtor, to deliver a Demand Notice in respect of the outstanding Operational Debt. Section 8(2) lays down that the Corporate Debtor within a period of 10 days of the receipt of the Demand Notice would have to bring to the notice of the Operational Creditor, the existence of dispute, if any. From a plain reading of the above provision, it is clear that the existence of dispute and its communication to the Operational Creditor is therefore statutorily provided for in Section 8. In the present case, it is an undisputed fact that the demand notice was issued by the Operational Creditor on 01.09.2020 and notice of dispute was raised by the Corporate Debtor on 18.09.2020, marginally beyond the prescribed period of ten days.

9. Now coming to Section 9 of IBC, sub-section (1) thereof provides that if the Operational Creditor does not receive payment from the Corporate Debtor or notice of the dispute under Sub-section (2) of Section 8, he may file an

Application under Section 9(1) of the Code. It remains an undisputed fact that the Operational Creditor did not receive any payment from the Corporate Debtor and chose to file an application under Section 9 of IBC. However, Section 9(5)(ii) envisages that if a notice of dispute is received by the Operational Creditor or there is a record of dispute in the Information Utility, the application is liable to be rejected by the Adjudicating Authority.

10. Given this background of relevant statutory construct of IBC, we now proceed to see from the facts of the present case whether any notice of existence of dispute had been raised and, if so, whether there was sufficient material on record to validate the genuineness of the dispute so raised or whether the dispute lacked plausibility and was contrived to evade the liability to pay the outstanding debt.

11. Before we deep-dive into the facts of the case and come to our analysis, we would like to bear in mind the guiding principles laid down by the Hon'ble Supreme Court in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited in Civil Appeal No. 9405 of 2017***. It is relevant to refer to paras 33, 51 and 56 of the said judgment which is extracted as hereunder:

> *"33.....What is important is that the existence of the dispute and/or the suit or arbitration proceeding must be preexisting i.e. it must exist before the receipt of the demand notice or invoice, as the case maybe. In case the unpaid operational debt has been repaid, the corporate debtor shall within a period of the self-same 10 days sent and attested copy of the record of the electronic transfer of the unpaid amount from the bank account of the corporate debtor or send an attested copy of the record that an operational creditor has encashed a cheque or otherwise received payment from the*

corporate debt [Section 8(2) (b)]. It is only if, after the expiry of the period of the said 10 days, the operational creditor does not either receive payment from the corporate debtor or notice of dispute, that the operational creditor may trigger the insolvency process by filing an application before the adjudicating authority under Sections 9(1) and 9(2).....

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51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5)(2)(d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the "existence" of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage is whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application."

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56. Going by the aforesaid test of "existence of a dispute", it is clear that without going into the merits of the dispute, the appellant has raised a plausible contention requiring further investigation which is not a patently feeble legal argument or an assertion of facts unsupported by evidence. The defense is not spurious, mere bluster, plainly frivolous or vexatious. A dispute does truly exist in fact between the parties, which may or may not ultimately succeed, and the Appellate Tribunal was wholly incorrect in characterizing the defense as vague, got-up and motivated to evade liability."

12. It is the case of the Respondent that the payments were not due as the Appellant had not been able to supply and install the pump-sets within time period allowed by the Government of Bihar in terms of the contract at the identified locations as was required of them. The Appellant was well aware of the stipulated time-period including the extension allowed by the Government of Bihar and the instances of delayed deliveries had been conveyed from time to time over WhatsApp messages exchanged between the representatives of two parties. Having failed to discharge their obligations, it is the case of the Respondent that the debt was neither due nor payable besides there being pre-existing dispute arising out of delayed supply of pump-sets which were also faulty and defective and that this aspect was adequately highlighted in their reply to the Demand notice.

13. Given this backdrop, it will be useful to find out how the Adjudicating Authority has considered the spectrum of facts to arrive at the conclusion that there existed pre-existing disputes. We notice that at paragraph 5 of the impugned order, the Adjudicating Authority has not taken into cognizance of the WhatsApp conversations to constitute evidence of pre-existing dispute on the ground that there was no authenticity established as such that these messages were actually exchanged between the authorised representatives of both the parties.

14. While it cannot be denied that use of WhatsApp as a communication tool is a prevalent mode amongst corporate entities, be that as it may, it is well settled that electronic records including WhatsApp cannot be admitted as

evidence unless they meet the requirement outlined in section 65B of the Evidence Act. Prima facie, the Adjudicating Authority cannot be faulted for having exercised caution in not taking any informed decision on the issue of whether these messages evidenced pre-existing disputes by merely relying on the credibility of these WhatsApp messages.

15. The Adjudicating Authority has however come to the conclusion at paragraph 6 of the impugned order that there was a pre-existing dispute on the basis of an email dated 07.01.2020 which had been sent by Corporate Debtor to the Operational Creditor. At this juncture, it may be worthwhile perusing the two emails 07.01.2020 sent by the Corporate Debtor to the Appellant which are as extracted hereunder:

> *"Dear Hirenbhai,*
>
> *….*
>
> *The major problem with Antras system is that its performance days and hours are very less as compared to system installed by other companies as told by commissioner, engineer in chief, executive engineer and other officers of division. When we go for billing they directly tell us to replace the system giving the above mentioned reason.*
>
> *Headquarter has released a guideline for all contractors that motor should run for 8 hours. As far we have observed lubi system performance hours and days are better than antras system. On days and condition when antras system do not give water, lubi system does. None of the lubi system has required any maintenance till date*
>
> *Antras system do not perform at all when issue of shadow is there but lubi system does*
>
> *Here are few sites are mentioning where antras system is placed and we are facing problem ……"*

Second email

"Dear Hirenbhai,

Kindly find herewith the attachment.

1.Villagers, mukhiyas and sarpanch have written letter to executive engg taking concerned DM and PHED commissioner in each our solar pump system is ineffective as compared to other company's system bcoz they r not able to deliver.- water up to 8 hrs in winters well as in very high temperatures of summer ... due to which they are not ready to bill our sites .. Engineer in chief has reciprocated the same views...

2.Many motor used to become inoperative from time to time but of late many controllers are also not operating properly and some NEW controllers are faulty too.

3.Department is advising to go for another solar pump system.

Major reason of delay in billing:-

1. Our solar system not working properly.

2. Pump and controller fail randomly at some sites, for ex- Kumna sit's pump not working currently.

3. Departments ignore to do running bills, they wants to bill only successfully completed sites.

Earlier we also share many Complaints but not such Proper Solutions given from your dues to Currently we have Big Big with Department ..

IN FIRST SOME SITES STRUCTURE CONSTRUCT IN WRONG DIRECTIONS BUT WE HAVE ARRANGED STRUCTURES FOR THAT AND INSTALLED SOLAR PANELS IN CORRECT DIRECTIONS THAT IMAGE ALSO ATIACHED HERE WITH.

MOST ISSUES POSTED IN WHATSUP GROUPS BY OUR GROUND LEVEL STAFFS TIME TO TIME INTIMATE TO RECTIFIES OUR PROBLEM

HIRENBHAI

PLEASE LOOK ISSUES IN SERIOUS MANNER DEPUTE YOUR STAFF URGENT BASIS AND SOLVE ISSUES.

Thanks

Regards,

BHADRESH M KAPDI."

(Emphasis supplied)

16. A plain reading of the above two emails clearly highlight that the solar system based pump-sets were not working satisfactorily and that the pumps and the controllers failed randomly at various locations. By this email, the Operational Creditor was also informed by the Corporate Debtor that Government of Bihar was agreeable to release of payment only on successful completion of the commissioning and installation of the pump sets. The Adjudicating Authority has noted that this email had been sent to the Operational Creditor by the Corporate Debtor prior to the Section 8 demand notice dated 01.09.2020 sent by the Operational Creditor and hence the dispute raised in the email fell in the category of pre-existing dispute. The tone and tenor of the emails exchanged between the two parties clearly manifest existence of dispute which antedates Section 8 demand notice. The Adjudicating Authority also concluded that it was beyond the remit of Adjudicating Authority to enquire into such disputes and that the dispute needed to be investigated by a proper form and on this ground did not entertain the Section 9 application.

17. The counter-defence taken by the Ld Counsel of the Appellant was that this was in the nature of a dispute created by the Corporate Debtor and not a genuine dispute. In support of their contention, it was pointed out that the supply of goods was duly certified by a third-party inspection report which have been placed on record.

18. We have looked into the third-party inspection reports which have been placed at Annexure A-12 at pages 158 -196 of Appeal Paper Book (**'APB'** in short). On taking a close look, we notice that the third-party inspection reports were not carried out at the time of installation of the pump-sets but at the stage when the pump-sets were dispatched in boxed condition. The remark contained in these inspection report only mentions that "inspected quantity is passed/clear for dispatch". Therefore, it becomes clear that these inspection reports were not given after installation and testing of the pump-sets in running condition. The inspection reports were therefore relevant only to verify the proof of physical dispatch of pump-sets but did not certify the actual functioning of pump sets after installation. Further, nomenclating this inspection report to be a third-party inspection unilaterally was also questioned by the Ld Counsel of the Respondent as there is no document on record which showed that the agency carrying out the said inspection or the modalities of inspection were agreed upon by all the three parties viz. Operational Creditor, Corporate Debtor and the Government of Bihar. Basis the third-party inspection report submitted unilaterally by the Operational Creditor to claim that the goods supplied were not defective also does not impress us to accept the plea of the Operational Creditor that the pump-sets supplied were defect free and that Corporate Debtor was only creating a dispute to avoid the liability to pay. In the present factual matrix, the defence raised by the Corporate Debtor therefore cannot be held to be moonshine, spurious, hypothetical or illusory.

19. We have also seen the order by the Government of Bihar on 29.05.2020 as placed at pages 197-199 of APB addressed to the Corporate Debtor blacklisting the firm and forfeiture of its security deposit. The said order clearly states that as per the agreement, the period of completion of the scheme of mini water supply scheme based on electric pump was to end on 23.04.2018. On the request of the Corporate Debtor, the work was extended for the first time till 31.12.2019 and given further extension till 30.04.2020 but with penalty. However, post review of the work status, it was found that the work was completed only at 16 sites; that work remained in progress at 30 sites and no work had started at 54 sites. Hence the contract of the Corporate Debtor was cancelled and the security amount forfeited besides blacklisting the company.

20. That the dispute had continued to fester is also borne out by the fact that in a meeting held on 26.01.2021 between the representatives of the two parties, the Operational Creditor had agreed to replace the defective pump sets to the satisfaction of the Government of Bihar which was the end-user. The minutes of the meeting as communicated to the Appellant by the Corporate Debtor is as extracted hereunder:

> ***"Subject: Minutes of Meeting with Mr. Hiren Bhavsar Kashyap Infra and Mr. Vljay Shah HI Tech Sweet Water***
>
> *Minutes of Meeting at Bardoli between Mr. Hiren Bhavsar (Kashyap Infra- Director), Mr. Krunal (Kashyap Infra -Engineer), Mr. Mehul (Duke Pump) and Mr. Vijay Shah (Hi Tech Sweet Water), Mr. Bhadresh Kapdi (Hi Tech Sweet Water), Mr. Piyush Nemani (Vi mal agro) regarding Solar*

Based Water Distribution System of Bihar Districts - Dated 26.01.2021- 5.20 PM Points agreed by Mr. Hiren Bhavsar (Kashyap Infra) as bellow;

1) All Pumps and Control Panel replace in lot of 10 as per earlier Installed in Various Districts of Bihar.

2) Mr. Hiren Bhavsar agree to Replace all sites handover in Proper Working condition as per Tender Conditions they should satisfied Government authority of Concern District.

3) Mr. Vijay Shah agree to give Payment after government official Concern District release payment of Proper working Solar Pumping Systems 25% of District payment release.

4) Mr. Hiren Bhavsar agree to replace all installed I unused Pump and Control give in proper Working Condition and Hi Tech will release every lot payment receipt from Govt. Department Concern District and hold 20,000/- per Site of unuse Pump and Control.

5) It was admitted by Mr. Hiren Bhavsar that the case was done at the behest of Mehul (Duke Pump).”

(Emphasis supplied)

21. It is clear from the agreement arrived at the meeting held on 26.01.2021 that the Operational Creditor had agreed to replace the defective pump sets and meet the standards as per the tender conditions which is a clear admission on their part for having been unable to discharge their obligations up to the expectations of the tender specifications. The Appellant has however contended that these minutes indicate that the dispute had come to an end and stood amicably settled. We cannot be unmindful of the fact that this meeting was post the issue of demand notice and in factoring the presence of pre-existing disputes we need to only find out if the disputes were subsisting at the time of filing the notice of dispute. Furthermore, merely because a meeting was held between the two parties to overcome the shortcomings in the meeting the obligations of supply and installation of pump-sets cannot be taken to imply that all disputes between the parties had subsided without the

parties being at ad idem on whether the obligations stood discharged on a mutually satisfactory basis.

22. We find that the Adjudicating Authority has concluded at paragraph 7 of the impugned order that the dispute which existed between the Operational Creditor and the Corporate Debtor prior to the demand notice about the quality of the pump sets supplied requires detailed inquiry and investigation by the proper forum and that the Adjudicating Authority is not that forum.

23. To our minds, the Adjudicating Authority did not commit any error in returning this finding keeping in mind that IBC bestows only summary jurisdiction upon the Adjudicating Authority. Once plausibility of a pre-existing dispute is noticed, it is not required of the Adjudicating Authority to make further detailed investigation. What has to be looked into is whether the defence raises a dispute which needs further adjudication by a competent court. It is well settled that in a Section 9 proceeding, the Adjudicating Authority is not to enter into final adjudication with regard to existence of dispute between the parties regarding the operational debt. There was no requirement for the Adjudicating Authority in the present case to go under the skin of dispute and therefore the Adjudicating Authority rightly held that the Section 9 application was not maintainable in the present factual matrix.

24. In sum, the defence taken by the Appellant that the Corporate Debtor was trying to manufacture disputes fails to succeed. The defence raised by the Corporate Debtor cannot be held to be moonshine, spurious, hypothetical or illusory. For such disputed operational debt, Section 9 proceeding under IBC

cannot be initiated at the instance of the Operational Creditor. The Adjudicating Authority has therefore correctly noted that the conditions laid down in Section 9 having not been fulfilled, the application deserved to be rejected. We find no good reasons to disagree with the findings of the Adjudicating Authority.

25. Considering the overall facts and circumstance of the present case, and in view of the foregoing discussion, we are satisfied that the Adjudicating Authority did not commit any error in rejecting the Section 9 Application filed by the Appellant. There is no merit in the Appeal. Appeal is dismissed. We however make it clear that it will remain open to the Appellant to resort to other remedies that may be available to it under any other law. No order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Barun Mitra]
Member (Technical)

[Indevar Pandey]
Member (Technical)

Place: New Delhi
Date: 27.11.2024

Abdul/ Harleen